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WHAT IS THE EFFECT OF THE PROBATE OF A WILL IN ONE STATE, WHEN IT IS OFFERED FOR ALLOWANCE AND PROBATE IN ANOTHER? DOES IT BIND IMMOVABLE PROPERTY BEYOND THE TERRITORIAL JURISDICTION OF THE FOREIGN COURT? OR DOES IT LEAVE THE QUESTIONS OF CAPACITY AND EXECUTION OPEN TO CONTEST IN THE DOMESTIC TRIBUNALS?

SECOND ARTICLE.

II. There are, however, statutes to be construed, by which the allowance and probate of foreign wills are provided for. That of Massachusetts dates many years back, and with some departures from its original terms is, in substance, that a will proved in another State, with the probate thereof duly authenticated, may be presented to a court of probate in that Commonwealth; and *after notice, hearing, and due proceedings thereon, if it shall appear to the judge* that it ought to be allowed, it may be received and ordered to be recorded; upon which it is to have the force and effect of a domestic will. This provision has been, perhaps copied; certainly very generally adopted. There is, probably, not a State without a similar statutory provision.

The construction of these statutes, which is sometimes insisted on—the same given by the Court in *Crippen* vs. *Dexter*—makes the action of the domestic tribunal simply ministerial. Indeed,

no judicial question—supposing this interpretation admissible—remains to be settled. The recognition of a will is precisely that accorded to a conveyance of lands, and nothing more. It is usual to prescribe for the latter instrument certain forms of execution, acknowledgment, and authentication; of these, the recorder is made judge. Finding them to be fulfilled, he receives and records the instrument. So of the allowance of a foreign probate. If the will purports to have been executed with the solemnities required by law, and the requisite form of allowance and authentication appears, the Probate Court is to file and record the instrument, which thenceforth becomes valid and conclusive against all the world, as evidence of title to real and personal estate. This, at first blush, is limiting strangely the functions of a Court, and imposing on an officer, appointed to declare the law, a duty that might as well be entrusted to a clerk, or his deputy. There can be no need for the *actor*, *rues*, and *judex*, of whom a Court is composed, to dispose of such trivial business as this.

We think, however, nothing could be less satisfactory than such an interpretation. The language usually employed in the statutes admitting foreign wills, includes not only such as have been duly proved and allowed in any other of the United States, but in *any foreign country*. Any such instrument having been duly allowed and proved according to the laws of such State or country, may be *allowed*, filed, and recorded in any county where the testator may have real or personal estate upon which the same may operate. If the construction contended for avails for any purpose, it avails for transatlantic wills quite as much as for those from sister States. It is a maxim, *argumentum ab inconvenienti plurimum valet in lege.* May we not invoke it with propriety, when a statute perfectly reasonable, consistent, and susceptible of a sensible application, is to be tortured into an absolute abandonment of those prerogatives of sovereignty which the rudest, as persistently as the most enlightened States, insist upon and cherish?

It is to be remarked, that this foreign probate is to be made according to the laws of the State or foreign country, from which the will is derived. Upon the theory that the proper authentica-

tion is the only remaining step to give the instrument validity, the ultimate settlement of every question of probate is remitted to the foreign tribunal. If it be asked, why have the Legislature provided for the production of a foreign will and its authenticated probate, we reply, that without such provision the original will must have been produced. The statute relieves the proponent from this embarrassment. It affords him an easy means of procuring a domestic probate, without requiring him to forego the convenience, indeed, what may often be the necessity, of a foreign probate. He is not asked to produce the original, but a copy. And to put him on reasonable terms, that copy must be the copy of a paper which will stand the test of a probate in the place of its origin. With such a probate, duly authenticated, the proponent comes with *such evidence* as entitles him to propound his copy, and subject it to the test of a domestic probate.

Still regarding the language of the statute, we find it provides that when a copy of such will and the probate thereof, duly authenticated, shall be produced by the executor, or other person interested in such will, to the *Probate Court*, such Court shall *appoint a time and place of hearing*, and *notice shall be given* in the same manner as in the case of an original will prese ted for probate. Why this useless ceremonial, if the Courts are restricted to the inspection of seals, and the weighing of those familiar phrases in which official certificates are clothed; and beyond this, have no discretion but to register the decrees of other States, or of foreign countries? A Court is a place where justice is judicially administered; and when a Court appoints a time and place of hearing, and gives to the parties notice thereof, every one familiar with the course of the common law, supposes that something is to be *tried* and *determined;* some exercise of intelligence; some sentiment of responsibility; some play of judicial discretion; some one to be impleaded or defaulted; some right to be established; all these and more are implied when a Court summons parties to a hearing.

And so we find the statute prescribes something for the Court to do, after it shall have fixed a time and place for the appearance of the parties, who have been notified. If on *hearing*, it shall

appear to the Court that the instrument *ought to be allowed*, as the last will and testament of the deceased, the copy shall be filed and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in the same Court. We think this language so clear as to leave no occasion for doubt. The Court is not restricted to a scrutiny of seals and certificates; it is not directed to notify parties and fix a time and place for the performance of an empty ceremony; it is required to *hear a case*, and to determine what ought or ought not to be done. It is not merely a decision that something has been properly done elsewhere, according to the laws of the foreign tribunal; but *that* something having been so done elsewhere, is, if the evidence shall satisfy the Court, a thing fit to be done in the domestic tribunal.

The views entertained by the Supreme Court of Rhode Island are well stated in two opinions of C. J. Ames; the one, *Olney* vs. *Angell*, 5 Rhode I., 198; the other, *Bowen* vs. *Johnson*, *id.*, 112. In the former, a bill had been brought by two of the legatees of Susan Olney, under a will which had been admitted to probate in Wisconsin, where the testatrix died, but never proved or filed and ordered to be recorded in Rhode Island, against an administrator appointed in the latter State, for an account. The Court, after noticing the requirements of the statutes of Rhode Island, remark: "That in England, the probate of a will has always been considered a judicial act: yet, at the same time, as limited in its effect to things locally within the jurisdiction of the Court granting it. Thus, a Scotch probate is not recognized by an English Court of Chancery; but if the testator be domiciled in Scotland, and leave effects there and in England, the will is proved first in the Court of Great Sessions, in Scotland, and a copy duly authenticated being transmitted to England, it is proved in the Ecclesiastical Court, and deposited there as if it were an original will." * * * "It is old law, that a will made in a foreign country and proved there, must also be proved in England, in order to dispose of personal property in England." The Court continue: "Following this rule so early established and so fully carried out in the mother country, we apprehend it to be equally well settled by the decisions

and legislation of this country, *that the effect of a decree proving a will, like that of a decree granting administration, is confined* de jure, *to the territory, and things within the territory of the State setting up the Court.* In their nature, such decrees are decrees *in rem*, passed by Courts deriving all their authority from the State which institutes them, and necessarily, in great part, upon constructive notice only, to those interested in the decrees; and it is difficult to see how a wider operation could be allowed to them, consistently with a just attention to the rights and claims to the property of the decedent, of citizens of other States, in which the property was at the time of his death. Whatever other operation is allowed to them is mere matter of comity, which every State is at liberty to yield or withhold, according to its own policy or pleasure, with reference to its own institutions, and the interests of its citizens."

After the citation of numerous authorities, the Court conclude: "The legislation of nearly all the States, and certainly of our own, proceeds upon the supposition that such is the limited operation of the probate of a will, had in a foreign country, or in another State, and provides some mode, in general analogous to that pursued in England, with regard to a will which has received a Scotch probate, by which conclusive operation may be given to such a will within the State, *full notice being given to all persons interested, in order that they may appear and contest the validity of the same.*

The case of *Bowen* vs. *Johnson*, in the same Court, deserves to be maturely considered, as presenting one of a class of questions likely to disturb the Courts of any State that submits to have its litigation settled beyond its own control. "This cause," says the Court, "comes before us upon a motion for a new trial, for the decision of two questions which are raised by it; *first*, whether, as a matter of practice, a subsequent will, made and admitted to probate in another State, can be allowed to be filed and recorded here, without first revoking the probate of a prior will of the same testator, made by a Court of Probate in this State; and *second*, admitting that this might be done, whether the probate of the latter

will in another State, though taken subsequently to the domestic probate of the prior will of the same testator, is conclusive evidence of the validity of such latter will, by force of Art. 4, Sec. 1, of the Constitution of the United States. The appellant contends that both these questions should be decided in the affirmative; notwithstanding the apparent inconsistency of holding that a domestic decree of probate, unrevoked and unappealed from, is of no force to hinder a judicial act in derogation of it, whilst a foreign decree of probate is conclusive, and its merits cannot be inquired into, for the purpose of ascertaining whether a foreign will shall be filed and recorded here, so that it may operate upon real and personal estate within the jurisdiction of this State, at the time of the death of the testator."

It would seem the statement itself sufficiently refutes the proposition. But, supposing it to be true that a foreign probate is, by virtue of the statute of this State, conclusive, what power is left by which various supposed testamentary acts can be controlled? The case has evidently happened, and may often occur, in which, after a regular probate in the domestic Courts, a later will of the same testator, regularly admitted to probate in another State, may be presented, with the proper authentication, to be filed and recorded. The Court having no discretion, finding the attestation complete, must order the foreign will to record, when it is made effectual to pass property. Yet some means must exist to settle these questions between conflicting wills. Is the domestic will, admitted in due form, with the rights acquired, and the adjudications had under it, to go to the wall without ceremony? Yet if in such, or similar cases, the Courts of law determine the question between two testamentary acts, thus authenticated by their respective Courts, it is plain the foreign probate is put to the test, and is not held conclusive; and so might quite as well have been subjected to full inquiry when first presented, as when it becomes the occasion of an awkward judicial hitch.

The Court in Rhode Island disposed of the question in the record promptly. "It is certain that our statute does not proceed upon the supposition that a foreign probate, or the probate of a will in

another State, which are placed by it upon the same footing, are conclusive as to the validity of a will here, as a will either of personal or real estate; but on the contrary, supposes that neither is of any force to operate upon property here, except so far as the statute accords it to them. In this respect, our legislature pursues the course of legislation common, we believe, to nearly all the States, of making the extra-territorial probate *prima facie* evidence only of the execution of the extra-territorial will, when proper proceedings are instituted here for its allowance and record; leaving it for those, who, upon the notice issued, appear to object to the will, to show cause if any they have, against the filing and recording of the same."

The cases of *Lovett* vs. *Harris*, 24 Penn. 332; *Peplin* vs. *Hawker*, 8 N. H. 124; *Patten* vs. *Talman*, 27 Maine, 17, are cases arising upon domestic probates, where attempts have been made, in common law actions, to impeach the will. In such cases, the decisions are numerous, though not uniform, that the probate is conclusive.

Some stress has been laid upon the case of *Dublin* vs. *Chadbourn*, 16 Mass. 433, but it does not sustain the doctrine of conclusiveness. If attention were paid only to the syllabus, such a notion of the case might be obtained. The body of the case shows a different view of the matter. The action was disseisin. The demandant produced a will duly proved in a Probate Court of New Hampshire; and the record shows, that on appeal to the Supreme Court, the probate had been there affirmed. The executor, after these proceedings, produced a copy of the will and probate, to the proper Probate Judge in Massachusetts, and petitioned that it might be filed and recorded in that State, pursuant to the statute of 1785. After the *required notice and proceedings*, the judge made his decree, and allowed the New Hampshire will to be filed and recorded. The objections, which were made at the trial, to the admission of the will and probate in evidence, were overruled, and the proceedings held conclusive. And so they might, very properly. At page 441, the Court remark: "This objection, if well founded, ought to have been shown in the Probate Court, and

would have been sufficient to have prevented the filing and recording of the will. The statute prescribes the notice to be given by the Judge of Probate, and the time allowed for all persons interested to appear and show cause against the allowance of the will; *and these requisitions were complied with in the present case.* It seems very clearly the intent of the statute that this, *and every other objection* to the *validity of the will*, should be heard and determined, in the course of that proceeding in the Probate Court."

So, also, our attention has been directed to the case of *Parker* vs. *Parker*, 11 Cush. 519. There, again, a New Hampshire will and probate had been filed and recorded in Massachusetts. In an action for real estate, the plaintiff offered the will in evidence, but was met by the objection, that the testatrix, at the time of its execution, was a married woman. The Court remark, at page 531: "The question of power or authority to make a will, is also an element of a valid will, and practically, as we have shown, has been treated and considered as one for the adjudication of the Probate Court, and within its jurisdiction. Such being the case, and *the question of authority to make the will being fully open to be controverted by the heirs, when the will is offered for probate*, we perceive no greater objection to holding the decree conclusive on this subject, than would equally arise from the acknowledged effect of such decree upon the question of the sanity of the testator, and the due execution by the testator, and the proper number and competency of the witnesses."

The case of *Shephard* vs. *Garriel*, 19 Ill. R. 313, may be appealed to. But it cannot aid the defendants. That was an ejectment, in which a will accompanied by the proofs of a foreign probate, was offered in evidence. The only objection was to its attestation. No question was presented of either capacity or execution. The Supreme Court held, that under the statutes of Illinois, the authentication was sufficient, and the evidence, therefore, admissible. But this case must be read in the light furnished by the prior cases in the same Court, of *Ackless* vs. *Seekright*, 1 Breeze, 46, and *Ferguson* vs. *Hunter*, 2 Gil. 657. The former was an action of eject-

ment, in which the Court permitted a domestic probate to be contested. In the latter case, the Court, in combatting the objection that a judgment of probate is conclusive, declares that the "act of taking proof of the execution of a will, is a ministerial act." The Court refer to *Ackless* vs. *Seekright*, as a case in which this doctrine was practically settled. The Court proceed to refer with approbation, to a case where it is decided, that a probate is conclusive between parties litigating it, as to the personalty, but *not even then* as to the realty over which the surrogate had no jurisdiction.

Equally true are these observations, when applied to the case *ex parte Poval*, 3 Leigh (Va.,) 816. In that case a will proved in Louisiana was admitted to probate, as a will of real estate, *upon the proofs adduced in the Louisiana Court:* those proofs corresponding to the requirements of the Virginia statute. The Court declare that the "law, as it is now written, has existed for nearly forty-two years; and it is believed, there is not a single instance in which the testimony of witnesses in this Court, or obtained by virtue of a *dedimus potestatem* issuing hence, has been required to admit any will to probate." But it would be incredible that any State should, upon *ex parte* proceedings, tie the hands of its citizens, and deliver over their property to the exclusive control of a foreign Court. And so it proves, that the legislative enactment which is thus referred to by the Court, provides, "that such will shall be liable to be contested and controverted in the same manner as the original might have been." See note to the reported case.

III. It is plausibly argued that the probate of a will is a judgment, and when the record of the will and probate is produced in another State, authenticated according to the Act of Congress, it concludes all parties as to the questions of validity and due execution, by virtue of the provisions of Art. 4, Sec. 1, of the Constitution of the United States, and of the Act of Congress of May 26, 1790. So far as this question has occurred in any case in the Supreme Court of the United States, this view of it does not seem to have been taken. The cases have been already cited from that

Court in which, if ever, the question might properly have been raised and decided; but it appears to have been passed, with a single exception, in silence, by counsel and Court. We can have no difficulty in conjecturing the reasons for this silence. In many instances the ordinary act of allowing probate of a will has been regarded as simply ministerial. In England the two forms had long been recognized, called the *common form* and *solemn form*. The one was the act of the officer, to whom the executor produced the will; when, in the absence of the parties interested, and without citing them, the witnesses were heard, and the probate allowed. The other was a formal proceeding, in which such persons as had an interest were cited to be present at the probation and approbation of the testament; witnesses were produced and examined not only on the interrogatories of the party producing them, but upon those of the adverse party. And the difference between these forms was that the executor of a will proved in common form, might, at any time within thirty years, be compelled by one having an interest, to prove it *per testes*, in solemn form. Williams on Ex., 275, 281. In this country, the usual process for proving a will has borne a strong analogy to the English probate in common form. Hence, it has been almost universal to allow, by statute, an appeal from the Probate Court; or a direct proceeding to attack the probate; or to permit, in controversies with regard to land, evidence impeaching the validity to the will, to be given to the jury.

For this reason, and for the reason that the notice has been usually by publication, such character of conclusiveness has seldom been attributed by the profession to the probate of a will. And so we see in the cases already cited—*Doe* vs. *McFarland*, *United States* vs. *Crosby*, *Kerr* vs. *Moon*, *McCormick* vs. *Sullivant*, *Wilkinson* vs. *Leland*, *Armstrong* vs. *Lear*, *Carmichael* vs. *Elmendorff*, *Barney* vs. *Brashear*, *Sneed* vs. *Ewing*, *Bowen* vs. *Johnson*, *Olney* vs. *Angell*, and *Lapham* vs. *Olney*, no such objection has been raised; or, if raised, has been instantly overruled.

The cases to be found in the various volumes of State reports are fairly illustrated by *Ives* vs. *Allyn*, 12 Verm. 589. The action

was ejectment. A foreign will, with its probate regularly authenticated, had been offered by the plaintiff. The Supreme Court, referring to the statutes of Vermont, say: "Notice is to be given to all persons concerned, to *appear and contest* the probate, or filing and recording, and when recorded, the copy of the will, thus proved and allowed in another State, recorded here, is to have the same effect as the probate of an original will. Without this statute, it would have been necessary to have produced the original wills, and *the probate of Rhode Island would have had no effect on any lands in this State, devised under either of the wills.* The copies of the wills not having been filed and recorded in any probate Court in this State, and no probate of them having been obtained, were not legal evidence of their execution, and were not admissible in evidence." It is, from this reasoning, quite plain that the Court in Vermont had no idea that a foreign probate of a will, devising lands in that State, precluded those interested in the estate from questioning the validity of the will when offered for probate in a State Court.

Judge Story, at § 609, of his Conflict of Laws, remarks upon the constitutional provision in question: "But this does not prevent an inquiry into the jurisdiction of the Court in which the original judgment was rendered, to pronounce the judgment, nor an inquiry into the right of the State to exercise an authority over the parties, or the subject matter." He examines the question with more attention, however, at § 1313 of his Commentaries on the Constitution: "The act of May 26, 1790, after providing for the mode of authenticating the acts, records, and judicial proceedings of States, has declared, 'and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit giveh to them in every Court in the United States, as they have by law or usage in the Courts of the State from whence the said records are or shall be taken.' It has been settled upon solemn argument, that this enactment does declare the effect of the records as evidence when duly authenticated. It gives them the same faith and credit as they have in the State Court from which they were taken. If, in such Court, they have the faith and credit of the highest nature,

that is to say, of record evidence, they must have the same faith and credit in every other Court. So, that Congress have declared the effect of the records, by declaring what degree of faith and credit shall be given to them. If a judgment is conclusive in the State where it is pronounced, it is equally conclusive everywhere. If re-examinable there, it is open to the same inquiries in every other State. It is, therefore, put upon the same footing as a domestic judgment. But this does not prevent an inquiry into the jurisdiction of the Court in which the original judgment was given, to pronounce it, or the right of the State itself to exercise authority over the persons, or the subject matter. The constitution did not mean to confer a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction *over persons and things within their territory.*"

It may be urged, however, that in *Darby* vs. *Mayer*, *supra*, the Supreme Court have intimated a doubt upon this question. In that case a will of land in Tennessee had been proved in an Orphans' Court in Maryland; and, without any allowance by a Probate Court in Tennessee, was offered in evidence in an action of ejectment brought in the latter State, for the recovery of the premises devised. The Court remark, when the constitutional provision is pressed upon their attention, "as this is a question of some delicacy, as it relates to devises of lands, the Court passes over it at present." No question was made at all as to the conclusiveness of the Maryland probate. Nor was any notice taken of the former cases of *Kerr* vs. *Moon*, and *McCormick* vs. *Sullivant*, where it was expressly ruled that the foreign probate was utterly unavailing, and the will inadmissible in evidence, unless they had been produced and approved in a Court of the State in which the land was situated. In the former case, referring to the necessity of probate in the Courts of the *situs*, it is said, had the will "been so offered, it might have been contested, and for anything that we can say, the sentence of the Court of probate might have been not to admit it to record." And in the latter, it is declared, that the will, when offered in the local Court, "is liable to contest by the heir-at-law, as the original might have been." The intimation of doubt cannot be said to leave

the authority of the Supreme Court balanced upon the question; for the former cases must be expressly overruled, if a probate in one State is held, *proprio vigore*, binding upon lands in another.

The question has been twice directly presented in the Supreme Court of Rhode Island, in cases already referred to. In *Olney* vs. *Angell*, *supra*, it is thus remarked upon: "We do not apprehend that Art. IV. § 1, of the Constitution of the United States, extends to the operation of the probate of a will, as a judicial act of a State, beyond its own territory. 'Full faith and credit' are given to such a decree, when it is left where it is found, local in its nature and operation."

This, it will be observed, is a recent case, as is, also, the case of *Bowen* vs. *Johnson*, *supra*, in which a more careful consideration is given to the same point. After a reference to the case of *Olney* vs. *Angell*, which had been before decided, but was not until afterwards reported, the Court proceed: "The probate of a will is unlike a judgment between parties subject to the jurisdiction of the Court rendering it, in this—it is confined in its operation to things within the State setting up the Court which takes the probate. It has been so treated, we have seen, in the country from which we derive our jurisprudence, and, in general, at least, by the Courts and legislatures of our own. Full faith and credit are given to it abroad, when the same faith and credit are given to it which it has at home; and that is, that it is to be conclusive evidence of the validity of the will, as affording title to things within the jurisdictional limits of the Court at the death of the testator, *whether such title comes in contest within or without those limits.* The clause of the Constitution of the United States referred to was not designed to extend the jurisdiction of local Courts, or to extend beyond its just limits, the operation of a local decree; but to provide a mode of authenticating evidence of the record of a judicial proceeding had in one State, so that the proper general result of it might be conveniently attained in every other State, against persons and things justly within the range of the proceeding. Notwithstanding this clause, a judgment in a suit between parties is, as such, void out of the State, as to parties not personally served, and not appearing

to defend within the State whose Court renders the judgment; although if the suit be commenced by attachment of things within the State, it is, without such service or appearance, good as a judgment *in rem* against those things, to condemn them to satisfy the judgment. As little does this constitutional provision extend the jurisdiction of a municipal Court of probate beyond the limits of the State which sets it up, and is quite satisfied, in our judgment, with leaving the probate of a will where it finds it, a decree local in its nature and operation."

In the case of *Sneed* vs. *Ewing*, *supra*, the Chief Justice employs the following language: "As the probate in Indiana did not (more especially as it was *ex parte*) conclude the right to the property here at Moore's death; hence, if, in 1807, Indiana had been a 'State' in this Union, the probate there would not be conclusive here; for, the probate in one State of a will devising property in another State, is not, as to that property, effectual and conclusive even in the State in which it is granted; and, of course, it cannot be made, by the Federal Constitution, more availing in the State in which the property was at the death of the testator."

It may be suggested in this connection, that, if it were true that the Constitution and laws of the United States apply to this class of cases, they only give to such a foreign judgment, when produced in a Court of another State, the same force and effect which are allowed to it in the Courts of the State where it was rendered. An instance can hardly be found where the allowance of probate is not examinable in some form, in the Courts of the country where it has been allowed. If it may be re-examined there, may it not be re-examined in the Courts of a foreign State?

However much the profession may be inclined to respect the decisions of the Supreme Judicial Court of Massachusetts, especially when they are pronounced by a judge so widely known and highly esteemed as the late Chief Justice, it may be that a more thorough inquiry will throw doubts upon the case of *Crippen* vs. *Dexter*, in which it is declared that "a decree of a probate Court of another State, admitting to probate a will within its jurisdiction, is conclusive evidence, if duly authenticated, of the validity of the will, upon an application to prove it in this State."